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No. 13,004

IN THE

United States Court of Appeals

For the Ninth Circuit

RAOUL A. COSENZA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court,
District of Arizona

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TABLE OF CONTENTS

STATUTES

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JURISDICTIONAL MATTERS

In the United States District Court for the District of Arizona, Honorable Dave Ling presiding, the appellant Raoul A. Cosenza on April 23, 1951 was adjudged guilty of the offense of violating 18 U.S.C. § 2315 (receiving stolen property) and was adjudged guilty of the offense of violating 18 U.S.C. § 4 (misprision of felony) (T.R. 13). On April 27, 1951 he filed a Notice of Appeal (T.R. 14).

The District Court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF FACTS

Appellant was indicted on two counts. The first count charged that in Phoenix, Arizona he unlawfully received from one George Henry Booth certain jewelry of an approximate value of $25,000 which had been stolen in Oklahoma City, Oklahoma, "knowing that said jewelry had been stolen as aforesaid and was then and there in interstate commerce," in violation of 18 U.S.C. § 2315 (T.R. 3).[1] The second count charged that he knew that the said Booth had transported in interstate commerce the stolen jewelry and "having actual knowledge of the commission of said felony * * * did, on or about the first day of December, 1949, in the State and District of Arizona, unlawfully and feloniously conceal the commission of said federal offense and did not, as soon thereafter as possible, in said State and District, make known the same to a judge or other person in civil or military authority under the United States of America," in violation of 18 U.S.C. § 4 (T.R. 5).[2]

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(1) Count I of the Indictment reads:

"On or about the 1st day of December, 1949, at the City of Phoenix, State and District of Arizona, Raoul A. Cosenza did unlawfully and feloniously, at one time, receive from one George Henry Booth and conceal certain stolen jewelry, to-wit, two diamond-studded watches, one platinum bracelet set with diamonds, and one diamond platinum pin, all being of the approximate value of $25,000.00, said jewelry having theretofore been stolen in Oklahoma City, State of Oklahoma, and transported in interstate commerce from the said Oklahoma City, Oklahoma, to Phoenix, Arizona, and the said defendant, Raoul A. Cosenza, then and there well knowing that said jewelry had been stolen as aforesaid and was then and there in interstate commerce."

(2) Count II of the Indictment reads:

"That on or about the 1st day of October, 1949, in the State and

He was tried before a jury and at the close of the evidence moved for a judgment of acquittal on the ground that the evidence was insufficient to justify a verdict of guilt on either count (T.R. 195). The motion was denied (T.R. 195), the case was given to the jury, and it returned a verdict of guilty (T.R. 11).

The government's case rested on the testimony of one witness—George Henry Booth. Its other witnesses testified to facts which were either not disputed or purported facts which had no relevancy to the guilt or innocence of the appellant. Taking the testimony which most strongly supports the prosecution, the following appears.

Booth, an accomplished burglar (T.R. 76), met the appellant sometime in 1947 or early 1948 (T.R. 30) and saw him off and on until the latter part of August, 1949, when, Booth testified, "I told him I was planning on going to the east and see if I could pick up some jewelry, I mean burglarize some places and get some jewelry and I asked him if he thought he might be able to get rid of it. He said

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District of Arizona, one George Henry Booth actually committed a crime in violation of Title 18 U.S.C.A. 2314, a felony cognizable by a court of the United States, in that the said George Henry Booth did on or about the said 1st day of October, 1949, transport and cause to be transported in interstate commerce, at one time, certain theretofore stolen jewelry, to-wit, one platinum bracelet set with diamonds, two diamond-studded watches and one diamond platinum pin, all being of the approximate value of $25,000.00, from Oklahoma City, State of Oklahoma, to the City of Phoenix, State and District of Arizona, and that the said George Henry Booth then knew the said jewelry to have been theretofore stolen as aforesaid; that Raoul A. Cosenza, defendant herein, having actual knowledge of the commission of said felony as above set forth, did, on or about the 1st day of December, 1949, in the State and District of Arizona, unlawfully and feloniously conceal the commission of said federal offense and did not, as soon thereafter as possible, in said State and District, make known the same to a judge or other person in civil or military authority under the United States of America."

he could if I could get anything worthwhile" (T.R. 32). In September, Booth went to Oklahoma City, stole some jewelry (T.R. 36), returned to Phoenix in October and told appellant that he had fifty or sixty thousand dollars worth of jewelry (T.R. 41). Appellant replied "I have some men in mind, some parties in mind, and if you want to sell it we would make a deal on it" (T.R. 41). Thereafter Booth went to Oklahoma and Texas, returning to Phoenix in the latter part of November, 1949 (T.R. 40). On December 1 he met appellant and the two went to Skipper's Bar in Phoenix to show the jewelry to a Mr. Hooper. The jewelry was carried by appellant, because Booth did not "want anything to do with the stuff" (T.R. 42).[3] At Skipper's, the appellant, leaving Booth in the bar room, went to Hooper's office in the rear, displayed the jewelry to Hooper, and then called in Booth.[4] There was no deal (T.R. 43-46); appellant put the jewelry in his pocket, he and Booth went to Booth's car, and appellant handed the jewelry back (T.R. 48). Around May, 1950, it seems, Booth took the jewelry to California and Nevada (T.R. 49, 50). He was apprehended in Reno and pleaded guilty to interstate transportation of stolen property (T.R. 52).

Other facts appear below.

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(3) This hardly rings true, coming from a felon who had the bravado to commit burglaries in various states, including some thirty around Phoenix (T.R. 70, 76). Had Booth not testified as he did, there could have been no semblance of a "receiving" on the part of Appellant.

(4) Appellant, who took the stand, denied the material parts of Booth's story (T.R. 128 et seq.).

ISSUES INVOLVED

The issues involved on this appeal relating to the first count of the indictment are: (1) Is the evidence sufficient to sustain the verdict and judgment? This was raised by a motion for judgment of acquittal made at the close of the evidence (T.R. 195). (2) The lower court, in charging the jury, failed to give an instruction on the most essential element constituting the crime for which the appellant was found guilty (T.R. 198). Had proper instructions been given it is inconceivable that the jury would have found guilt. Appellant made no request for the essential instruction. Was the error so grievous and prejudicial that this court will reverse the lower court?

The issue involved relating to the second count raises the question: (3) is the evidence sufficient to sustain the verdict and judgment? This was raised by a motion for judgment of acquittal (T.R. 195).

SPECIFICATIONS OF ERROR

I.

The District Court erred in refusing to grant appellant's motion for a judgment of acquittal on Count One of the indictment; for the evidence was insufficient to sustain the conviction.

II.

The District Court erred in failing to instruct the jury that "before a person may be convicted of the crime of receiving or concealing stolen property, it must be established beyond a reasonable doubt that such property is received or concealed when moving as, or which is a part

of, or which constitutes interstate commerce." (See note 8 for the entire instructions on Count One.)

Though no request for such an instruction was made, failure to give such an instruction constitutes such a fundamental and prejudicial error that this court will take notice of it.

III.

The District Court erred in refusing to grant appellant's motion for judgment of acquittal on Count Two of the Indictment; for the evidence was insufficient to sustain the verdict.

ARGUMENT

I.

The District Court erred in refusing to grant appellant's motion for a judgment of acquittal on Count One of the indictment; for the evidence was insufficient to sustain the conviction.

A. Facts Are Not Sufficient to Support a Verdict of Guilty of Unlawfully Receiving Stolen Goods Where There Is No Evidence to Show That the Goods Were a Part of Interstate Commerce When Received.

The pertinent part of 18 U.S.C. § 2315 reads:

> "Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise * * * of the value of $5000 or more * * * *moving as, or which are a part of, or which constitute interstate or foreign commerce,* knowing the same to have been stolen * * * Shall be fined not more than $10,000 or imprisoned not more than ten years, or both." (Italics added)

When the appellant received the articles of jewelry were they moving as, a part of, or did they "constitute"[5] inter-

(5) Obviously, goods, wares, and merchandise do not "constitute" interstate commerce. In context, the word is meaningless.

state commerce? There is no evidence upon which the jury could answer the question in the affirmative.

Booth (T.R. 180) and his son (T.R. 72, 175) lived in Phoenix, Arizona, where Booth had been for a "lot of years" (T.R. 53). For a time he was engaged in buying and selling liquor licenses (T.R. 31, 53); later in the business of robbery (T.R. 76). A woman, Lona Lane, apparently his closest companion, also lived and worked there (T.R. 170 *et seq.*). His telephone was at least for a time in her home (T.R. 171). When Booth went to Oklahoma and stole the jewelry (T.R. 36) he had in mind merchandising it in Arizona (T.R. 39). He brought it to Arizona in October, 1949 (T.R. 40) where he hid it (T.R. 48), and took another trip to the east to commit more burglaries (T.R. 66). On his return to Phoenix in the early part of December, 1949, he showed the jewelry to appellant for the first time (T.R. 62). In the interim he had displayed the jewelry to prospective purchasers in the City of Phoenix (T.R. 64).

After Booth confessed to committing his crimes, he pleaded guilty to the transportation of the stolen jewelry in interstate commerce from the State of Oklahoma into the State of Arizona (T.R. 52).

Compare 18 U.S.C. § 2317, relating to receipt of stolen cattle, where the phrase used is "moving in or constituting a part of" interstate commerce; 18 U.S.C. § 659, relating to interstate baggage, uses the phrase "moving as or which are a part of or which constitute an interstate or foreign shipment of freight * * *" Title 18 U.S.C., 1940 ed., § 416 on which § 2315 of the 1948 edition is based (though it has an entirely different consequence) employs the phrase "while moving in or constituting a part of interstate" commerce.

It will be noticed that Count One of the indictment uses none of the phrases found in § 2315. It simply alleges that when appellant received the jewelry it "was then and there in interstate commerce."

Under the authorities it must be concluded that as a matter of law the jewelry had come to rest in Arizona prior to the time of appellant's ephemeral "receiving." There was no evidence to indicate that when the goods were received by the appellant they were moving as, or were a part of, or constituted interstate commerce. And the burden of proof as to that feature rested on the government. So, in *Wolf v. United States,* 7 Cir., 1930, 36 F.2d 450, where the court considered the National Motor Vehicle Theft Act, § 4 (18 U.S.C., 1940 ed., § 408), which is now 18 U.S.C. § 2313,[6] it said:

> "The burden was upon the government to show the car was a part of interstate commerce when defendants received it."

In accord is *McAdams v. United States,* 8 Cir., 1934, 74 F.2d 37 where the court held it to be reversible error because of a refusal to give an instruction to the effect that the burden was on the government to show stolen automobiles, at the time they were received, "were then and there in interstate commerce and transportation."

Davidson v. United States, 8 Cir., 1932, 61 F.2d 250[7] considers a situation in which a car was stolen in Oklahoma, driven to Kansas City, Missouri where it was stored for a few days, and then delivered to the defendants Brummell and Davidson, who sold it. They were charged with and

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(6) Title 18 U.S.C. § 2313 reads:

"Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be" punished. Because of the lack of cases in point construing § 2315, it is necessary to turn to decisions in which this statute was involved.

(7) Cf. *Parsons v. United States,* 5 Cir., 1951, 188 F.2d 878.

convicted of illegally receiving the car. The Court of Appeals, in reversing, said:

> "The destination of the transportation of this car, as disclosed by the evidence, was Kansas City. That destination had been reached several days before Gillette [who had possession of the stolen car] brought the car to these two defendants. Now, then, in determining whether or not the evidence sustains the verdict of guilt as to the third count [unlawfully receiving], it, of course, is not necessary to show that these two defendants knew that the car was moving in interstate commerce when it came into their possession; but it is necessary for the government to prove that at the time the car was received by these defendants, that such car was a part of interstate commerce. Receiving a stolen car that has lost its character as interstate commerce constitutes no crime against the laws of the United States * * * The government has totally failed to sustain this burden of proof, and there is no testimony or circumstances in the record that would support a finding that this car was in interstate commerce at the time it was received by these two defendants. In fact, without some testimony indicating that the destination of this car was Brummell and Davidson, it is entirely consistent with the evidence that the interstate character of this car ceased when it was stored in the garage by Gillette at 1812 Independence Avenue, Kansas City."

See, also, *Hill v. Sanford,* 5 Cir., 1942, 131 F.2d 417; *United States v. Gardner,* 7 Cir., 1948, 171 F.2d 753; *Cox v. United States,* 8 Cir., 1938, 96 F.2d 41.

The government's own evidence shows that the stolen jewelry had reached its destination in Arizona. It was no longer a part of interstate commerce when appellant received it. Because Booth was unable to dispose of it as he

intended, and then again put it into interstate commerce makes no difference, for the facts existing at the time of the receiving are the controlling element with reference to interstate commerce. *United States v. Gollin,* 3 Cir., 1948, 166 F.2d 123 (same case, 176 F.2d 889).

II.

The District Court erred in failing to instruct the jury that "before a person may be convicted of the crime of receiving or concealing stolen property, it must be established beyond a reasonable doubt that such property is received or concealed when moving as, or which is a part of, or which constitutes interstate commerce." (See note 8 for the entire instructions on Count One.)

Though no request for such an instruction was made, failure to give such an instruction constitutes such a fundamental and prejudicial error that this court will take notice of it.

B. Where a Court Fails to Instruct the Jury on the Essential Ingredients of the Only Offense upon Which a Conviction Can Rest, the Error Requires Reversal.

In order for the jury to find the appellant guilty of violating 18 U.S.C. § 2315, the jury would have to believe beyond a reasonable doubt that the defendant (1) received goods, wares, or merchandise (2) of a value of $5000 or more (3) which when he received it was moving as, or which was a part of, or which constituted interstate commerce (4) knowing the jewelry to have been stolen. But the court, as shown in this specification, in effect charged that it was sufficient to support guilt if the jury believed that only elements (1) and (4) existed.[8] By failing prop-

(8) The instructions in their entirety relating to the first count (which count was read to the jury almost verbatim) are as follows:

"Now, the statute under which that first count is drawn reads as follows:

'Whoever receives or conceals any goods, wares, merchandise of the value of $5,000.00, or more, moving as, or which

erly to instruct, the court eliminated from the jury's consideration the only element—that of interstate commerce—which could possibly make appellant's conduct an offense against the laws of the United States. Twice the court said, in a negative way, that the appellant could be convicted if the jury believed that he received goods knowing that they had been stolen and knowing they had been transported in interstate commerce.

Admittedly counsel for appellant was at fault in not requesting additional instructions to cover element (3).

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are a part of, or which constitute interstate commerce, knowing the same to have been stolen, shall be punished as the act provides.' "

"'Interstate commerce' as defined by the Federal statute includes commerce between one state, territory, possession or the District of Columbia, and another state, territory or possession or the District of Columbia.

"By Count 1 of the indictment, the defendant is accused of having unlawfully and feloniously received and concealed certain stolen jewelry, knowing that said jewelry had been stolen and was then and there in interstate commerce.

"The word 'receive' as used in the statutes, means to accept, and to 'accept' or 'possess' means to have control, care and management and not a passing control, fleeting and shadowy in its nature, and before a person may be convicted of the crime of receiving or concealing stolen property, it must be established beyond a reasonable doubt, not only that such person knew (230) that such property was stolen and transported in interstate commerce, but that he did receive and conceal it within the meaning of those words which I just defined to you.

"A mere passing, control or a brief, fleeting and shadowy possession of stolen property is not sufficient to justify a verdict of guilty, and unless you are satisfied beyond a reasonable doubt that the defendant in this case received and concealed the stolen jewelry in question, knowing it to have been stolen and transported in interstate commerce, within the meaning of the words of receiving and concealing as I have defined them to you, then your verdict must be not guilty."

1. AN INSTRUCTION WHICH PERMITS A JURY TO RETURN A VERDICT OF GUILTY TO RECEIVING STOLEN PROPERTY IN AN INTRASTATE TRANSACTION IS A FUNDAMENTAL AND PREJUDICIAL ERROR.

The court's instruction did not state the law. The point was considered in the often-approved case of *Grimsley v. United States,* 5 Cir., 1931, 50 F.2d 509. There, an indictment recited that in violation of Section 4 of the National Motor Vehicle Theft Act (see note 6) the defendant sold a Ford car which he knew was stolen and knew was transported from Oklahoma to Florida. The court held that the indictment did not state an offense, saying:

> "It is an essential element of the offense under the fourth Section that the accused receive the motor vehicle while it is moving as, or is a part of, or constitutes, interstate or foreign commerce. The act, as is apparent on the face of it, is based upon the commerce clause of the Constitution, and does not assume to punish one who receives or sells a stolen vehicle after it has ceased to move in, or be a part of, interstate commerce. *Brooks v. United States* (1925), 267 U.S. 432, 45 S.Ct. 345, 69 L.Ed. 699, 37 A.L.R. 1407."[9]

Unquestionably, the jury believed that the jewelry in the case at bar was stolen and was transported in interstate commerce. Presumably the jury believed that appellant knew it was stolen and knew that it had been brought to Arizona from another state. But it is hardly conceivable that it believed the appellant received the jewelry while the jewelry was a part of interstate commerce. See the discussion under Specification of Error Number I. If properly instructed, it seems certain that the jury would have brought in a verdict of not guilty. In this respect, see

(9) Sibley, J. dissented but not on the proposition made here.

Booth v. United States, 9 Cir., 1946, 154 F.2d 73. There it is held that a judgment of conviction will be reversed notwithstanding that the evidence is sufficient to sustain the conviction, if it appears that the verdict may have rested upon an erroneous instruction.

In numerous instances, contraband goods have been shipped in interstate commerce, and a defendant has had knowledge thereof and has received such goods. But if the reception is in intrastate commerce, there can be no federal offense. Such is the rule laid down in *Tot v. United States,* 1943, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (reversing *United States v. Tot,* 3 Cir., 1942, 131 F.2d 261). The court examined the Federal Firearms Act, 15 U.S.C. § 902, which, among other things, makes it unlawful for a person convicted of a crime to receive firearms shipped in interstate commerce. The court unanimously agreed that the offense must be confined to receipt as a part of interstate commerce and does not extend to a receipt in an intrastate transaction. See, also, *Minski v. United States, Delia v. United States,* 6 Cir., 1942, 131 F.2d 614.

In the *Tot Case,* the Supreme Court said (and approved):

> "Both courts below [in the *Tot* and *Delia Cases*] held that the offense created by the Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate. The Government agrees that this construction is correct."

Supposing that there is some evidence in this case to show that the appellant received the jewelry in interstate

commerce, such evidence would create a question of fact. Being then, a question of fact, it should have been given to the jury to be resolved. *Baugh v. United States,* 9 Cir., 1928, 27 F.2d 257.

2. THE COURT OF APPEALS WILL NOTICE A SERIOUS ERROR WHICH IS PLAINLY PREJUDICIAL EVEN THOUGH IT WAS NOT CALLED TO THE ATTENTION OF THE TRIAL COURT.

Rule 52(b) of the *Rules of Criminal Procedure* reads: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." This is a restatement of the prior law. Notes of *Advisory Committee on Rules,* 18 U.S.C., Federal Rules, p. 548.

The court in *Morris v. United States,* 9 Cir., 1946, 156 F.2d 525, 169 A.L.R. 305[10] quoted with approval the following from *Suhay v. United States,* 10 Cir., 1938, 95 F.2d 890:

> "* * * Where life or liberty is involved, an appellate court may notice a serious error which is plainly prejudicial even though it was not called to the attention of the trial court in any form."

And this court went on to say:

> "In a criminal case, it is always the duty of the court to instruct on all essential questions of law, whether requested or not."

Reference is made to *Screws v. United States,* 1945, 329 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495,[11] which contains the

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(10) Denman, J. dissented, but not on the principle presented here.

(11) Murphy, J. dissenting.

following language singularly suited to the situation here:

> "It is true that no exception was taken to the trial court's charge. Normally we would under those circumstances not take note of the error * * * But there are exceptions to that rule * * * And *when the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion.*" (Italics added.)

In harmony with these axioms is the rule of *Samuel v. United States,* 9 Cir., 1948, 169 F.2d 787.[12] See the annotation in 169 A.L.R. 315; and, generally, 4 *Barron, Federal Practice and Procedure,* Rules Ed. 496, § 2583. * * *

Without doubt, if the attention of the District Court had been directed to the fact that it failed to submit to the jury "the essential ingredients of the only offense on which the conviction could rest"—that is, the necessity of a belief upon the part of the jury that appellant's receiving was at a time when the jewelry was moving as, or which was a part of, or which constituted interstate commerce—it would have corrected its charge. The court would not have left the jury with the mistaken thought that it could find the appellant guilty even though he received the jewelry in a transaction which was apart from interstate commerce.

But the plain error of the court, appellant's counsel and the prosecution should not deprive the appellant of his liberty. It is the "law of the land" that he is entitled to a fair trial. *In re Oliver,* 1948, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682.

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(12) Cf. *Jackson v. United States,* 6 Cir., 1950, 179 F.2d 842, 181 F.2d 822.

An erroneous instruction may deprive one of a fair trial. *Screws v. United States, supra.* It did in this instance. Consequently this Court should reverse the judgment of the Court below.

III.

The District Court erred in refusing to grant appellant's motion for judgment of acquittal on Count Two of the Indictment; for the evidence was insufficient to sustain the verdict.

C. Facts Are Not Sufficient to Support a Verdict of Guilty of Misprision of Felony Where There Is No Evidence That the Accused Knew That a Federal Offense Had Been Committed or No Evidence That the Accused Actively Concealed the Crime.

The appellant, on count two of the indictment, was found guilty of the offense of violating 18 U.S.C. Sec. 4 (note 2). That statute reads:

> "Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to a judge or other person in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than three years, or both."

The crime that he is charged with having knowledge of—Title 18 U.S.C. § 2314—reads, in part:

> "Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen * * * shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

The witness Booth testified that he pleaded guilty to transporting stolen jewelry from Oklahoma to Arizona

(T.R. 52); and taking the evidence most favorable to the government, appellant knew the jewelry was stolen from outside the state of Arizona, and that he received it. Nevertheless these facts are not sufficient to establish that appellant knew that Booth had committed a felony cognizable by a court of the United States or that he, in any other manner, was guilty of misprision of felony.

1. THOUGH AN ACCUSED MAY KNOW THAT ANOTHER HAS STOLEN GOODS AND TRANSPORTED THEM IN INTERSTATE COMMERCE, HE CANNOT BE FOUND GUILTY OF MISPRISION OF FELONY UNLESS IT IS SHOWN THAT HE KNEW THAT THE VALUE OF THE GOODS WAS $5,000 OR MORE.

There is no evidence, nor can any inference be drawn from the evidence, that the appellant had the slightest knowledge that the stolen jewelry was worth $5,000 or more. And unless the appellant believed that it had at least that value he could not have known that Booth had committed a federal crime.

The record is silent as to whether or not appellant had any special knowledge as to the value of jewelry. It cannot be inferred that he knew any more about the subject than other laymen. He might have acquired information from Booth, who, assuming that the latter was an expert, would obviously, when trying to sell the jewelry, "puff up" the value. Booth testified that he told appellant it was worth easily $10,000 (T.R. 71). But, aside from Booth's testimony, the best offer Booth ever received, so far as appellant knew, was $600 (T.R. 46). As for its actual value, the government's expert witness would say no more than that it was worth in excess of $5,000 (T.R. 29).[13]

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(13) Under 18 U.S.C. § 2315 (receiving stolen property) and various other statutes, it is immaterial as to whether or not the

If the subject dealt with were a common article of trade a jury might "impute" knowledge of its value on the part of appellant, under proper instruction.[14] But where, as here, a highly unique article is involved, that would not be warranted.

Since the element of knowledge of value was essential to knowledge of the commission of a federal crime; and since there was no evidence of knowledge of value, the appellant properly could not have been found guilty of misprision of felony.

2. AN ACCUSED CANNOT BE FOUND GUILTY OF MISPRISION OF FELONY UNLESS HE COMMITTED POSITIVE ACTS CONCEALING THE CRIME OR MISLEADING GOVERNMENT AUTHORITIES.

Counsel for the appellant have not been able to find any cases in which a conviction for the violation of 18 U.S.C. § 4 as a substantive offense has ever been upheld by an appellate court. This is surprising because the statute has been on the books in its present form, so far as pertinent here, for over 160 years.[15] If the statute properly could be

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accused knows the value of what he receives (transports, etc.). As shown here, however, knowledge by the accused of the value of what another steals, receives, etc., is material under the misprision of felony statute.

(14) In the instructions to the jury, nothing was said about the point presented here; nor was anything at all said about the value of the jewelry (T.R. 199).

(15) 1 Statutes at Large 113, § 6 reads:

"That if any person or persons having knowledge of the actual commission of the crime of wilful murder or other felony, upon the high seas, or within any fort, arsenal, dock-yard, magazine or other place or district of country, under the sole and exclusive jurisdiction of the United States, shall conceal, and not as soon as may be disclose and make known the same to some one of the judges or other persons in civil or military authority under the United States, on conviction thereof, such person or persons shall be adjudged guilty of misprision of felony, and shall be imprisoned

applied to a set of facts like those found in the case at bar, then no doubt its use would be more popular with the government prosecution than is the use of the conspiracy statute, 18 U.S.C. § 88;[16] for, if the government is correct in this case, it would take less proof to support a conviction under § 4 than under § 88.

One of the early cases to consider the pertinent statute is *United States v. Farrar,* D.C. Mass., 1930, 38 F.2d 515. The defendant had purchased intoxicating liquor, the sale of which was prohibited. Said the court:

> "The Act of April 30, 1790, as amended (18 U.S.C. § 251 [now § 4]), requires both concealment and failure to disclose. Under it some affirmative act toward the concealment of the felony is necessary. Mere silence after knowledge of the commission of the crime is not sufficient."

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not exceeding three years, and fined not exceeding five hundred dollars. [Approved Apr. 30, 1790]."

See 8 *University of Chicago Law Review* (1941), 338, where it is said: "Since the modern police organization has assumed major responsibility for the apprehension of criminals, prosecutions for misprision of felony are almost unknown." This article gives a good history of misprision laws.

(16) In several instances a Court of Appeals has sustained convictions of conspiracy to violate 18 U.S.C. § 4. *Stewart v. United States,* 5 Cir., 1942, 131 F.2d 624 (The facts are not set forth); *Long v. United States,* 10 Cir., 1943, 139 F.2d 652 (Joined with conspiracies to violate liquor laws. Sheriff was paid off by codefendants to inform them when Federal agents were around); *Hall v. United States,* 10 Cir., 1940, 109 F.2d 976 (Joined with conspiracies to violate liquor laws. City officers paid by codefendants for protection and help in escape from Federal agents); *Donovan v. United States,* 3 Cir., 1932, 54 F.2d 193 (Wells, his lawyer Donovan, and Patrone agreed that Patrone would represent himself to be Wells and would serve Wells' sentence on a liquor smuggling charge. Patrone and Donovan appeared in court and Patrone, for Wells, was sentenced).

The *Farrar Case* was affirmed in *Farrar v. United States,* 1930, 281 U.S. 624, 50 S.Ct. 425, 74 L.Ed. 1078, 68 A.L.R. 892. As noted in *Bratton v. United States,* 10 Cir., 1934, 73 F.2d 795:

> "While the Supreme Court did not mention this statute, Judge Morton's opinion called it to the attention of the high court, and if that court had believed that failure to disclose, without more, was a crime, then a reversal must have followed."

In the *Bratton Case,* the defendants apprehended one Blackburn who illegally had possession of liquor. They released him and agreed not to report his crime to federal authorities if he would promise to pay them $300. An indictment was returned under 18 U.S.C. 1940 ed., § 251, and the defendants were found guilty. The Court of Appeals reversed, saying:

> "Section 146 [of the Criminal Code, 18 U.S.C. § 251] was enacted April 30, 1790 (1 Stat. 113, § 6), and as far as the researches of court and counsel disclose, has been before the courts but twice in the 144 years of its life. It provides that there must be both a concealment and a failure to disclose in order to constitute a criminal offense. The language is 'conceals and does not as soon as may be disclose.'[17] Some meaning must be given to the words 'conceal and.' If it should be held that a failure to disclose is in itself a concealment, then a conviction may be had for a failure to disclose without more, and the words 'conceal and' are thus effectively excised from the statute.
>
> "Following settled rules of construction, we must assume that Congress intended something by the use

(17) The relevant part of present law reads: "conceals and does not as soon as possible make known."

> of the words 'conceal and.' If any meaning is to be given them, an indictment must allege something more than mere failure to disclose—some affirmative act of concealment, such as suppression of the evidence, harboring of the criminal, intimidation of witnesses, or other positive act designed to conceal from the authorities the fact that a crime had been committed."

In *Neal v. United States,* 8 Cir., 1939, 102 F.2d 643, the court had these facts before it: John Neal, defendant's brother, stole more than $100,000 from a national bank over a period of years. John invested sums of money in the defendant's business, the sums being greatly in excess of his income. John then disappeared. The defendant aided in concealing him, "threw dust" in the eyes of the federal authorities, had books of account altered so that they would not show John's investments, and hid from the officers some $6,000 of John's money. The court held that this was not sufficient upon which to base a conviction on the misprision of felony statute.[18]

Decisions from the state courts are not helpful. The offense is now practically obsolete. 1 Burdick, *Law of Crimes* (1946), 444, Sec. 296; 1 Wharton's *Criminal Law* (12th ed.) 376, Sec. 289; *People v. Lefkovitz,* 1940, 294 Mich. 263, 293 N.W. 642; 25 *Marquette Law Review* (1941), 99; and 7 *University of Pittsburgh Law Review* (1941), 246 (where State authorities are collected). The federal definition of the crime is a departure from the common law. 32 *Virginia Law Review* (1945), 170; 54 *Harvard Law Review* (1941), 506. Consequently the decisions under the common law are not in point.

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(18) Woodrough, J. dissented on other grounds.

It must be concluded that there was no evidence upon which the jury could find the appellant guilty of misprision of felony.

CONCLUSION

It is respectfully submitted that in view of the foregoing this court should reverse the judgment of the District Court.

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